

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 21, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BONNIE D.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No: 1:21-cv-03147-LRS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.

ECF Nos. 10, 11. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Christopher H. Dellert. Defendant is represented by Special Assistant United States Attorney Joseph J. Langkamer. The Court, having reviewed the administrative record and the parties' briefing, is fully

¹ The court identifies a plaintiff in a social security case only by the first name and last initial in order to protect privacy. *See* LCivR 5.2(c).

1 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 10, is
2 granted and Defendant's Motion, ECF No. 11, is denied.

3 **JURISDICTION**

4 Plaintiff Bonnie D. (Plaintiff), filed for disability insurance benefits (DIB) on
5 March 29, 2019, alleging an onset date of September 1, 2013, which was amended to
6 September 8, 2016, at the hearing. Tr. 40, 155-61. Benefits were denied initially,
7 Tr. 91-93, and upon reconsideration, Tr. 99-105. Plaintiff appeared at a hearing
8 before an administrative law judge (ALJ) on January 21, 2021. Tr. 35-63. On
9 March 25, 2021, the ALJ issued an unfavorable decision, Tr. 12-34, and the Appeals
10 Council denied review, Tr. 1-6. The matter is now before this Court pursuant to 42
11 U.S.C. § 405(g).

12 **BACKGROUND**

13 The facts of the case are set forth in the administrative hearings and
14 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and
15 are therefore only summarized here.

16 Plaintiff was born in 1963 and was 57 years old at the time of the hearing. Tr.
17 *See* Tr. 155. She has work experience as a caregiver, housecleaner, dog washer, and
18 security guard. Tr. 43, 50-51.

19 The walking and standing she did as a security guard aggravated a prior groin
20 injury. Tr. 46. She started losing weight, having shakiness, having severe
21 migraines, had no energy, her joints hurt, she had difficulty with her bladder and

1 bowel, and back pain. Tr. 46. She had rheumatoid arthritis, nodules on her throat,
2 and emphysema. Tr. 46. Her husband did all the household chores. Tr. 47-48. She
3 had difficulty standing up and getting around. Tr. 48. The pain in her back with
4 twisting and moving was unbearable. Tr. 48. She has COPD which causes
5 shortness of breath. Tr. 52-53. She had difficulty focusing and remembering things.
6 Tr. 53.

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported by
11 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
12 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
13 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
14 citation omitted). Stated differently, substantial evidence equates to "more than a
15 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
16 In determining whether the standard has been satisfied, a reviewing court must
17 consider the entire record as a whole rather than searching for supporting evidence in
18 isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
21 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's
4 decision on account of an error that is harmless." *Id.* An error is harmless "where it
5 is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115
6 (quotation and citation omitted). The party appealing the ALJ's decision generally
7 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
8 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within the
11 meaning of the Social Security Act. First, the claimant must be "unable to engage in
12 any substantial gainful activity by reason of any medically determinable physical or
13 mental impairment which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than twelve months." 42
15 U.S.C. §§ 423(d)(1)(A). Second, the claimant's impairment must be "of such
16 severity that he is not only unable to do his previous work[,] but cannot, considering
17 his age, education, and work experience, engage in any other kind of substantial
18 gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

19 The Commissioner has established a five-step sequential analysis to determine
20 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 404.1520(a)(4)(i)-
21 (v). At step one, the Commissioner considers the claimant's work activity. 20

1 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in “substantial gainful
2 activity,” the Commissioner must find that the claimant is not disabled. 20 C.F.R. §
3 404.1520(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from
7 “any impairment or combination of impairments which significantly limits [his or
8 her] physical or mental ability to do basic work activities,” the analysis proceeds to
9 step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment does not satisfy
10 this severity threshold, however, the Commissioner must find that the claimant is not
11 disabled. 20 C.F.R. § 404.1520(c).

12 At step three, the Commissioner compares the claimant’s impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude a
14 person from engaging in substantial gainful activity. 20 C.F.R. §
15 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
16 enumerated impairments, the Commissioner must find the claimant disabled and
17 award benefits. 20 C.F.R. § 404.1520(d).

18 If the severity of the claimant’s impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (RFC),
21 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
2 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in the
5 past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable
6 of performing past relevant work, the Commissioner must find that the claimant is
7 not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing
8 such work, the analysis proceeds to step five.

9 At step five, the Commissioner should conclude whether, in view of the
10 claimant's RFC, the claimant is capable of performing other work in the national
11 economy. 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the
12 Commissioner must also consider vocational factors such as the claimant's age,
13 education and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant
14 is capable of adjusting to other work, the Commissioner must find that the claimant
15 is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of
16 adjusting to other work, analysis concludes with a finding that the claimant is
17 disabled and is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
21 capable of performing other work; and (2) such work "exists in significant numbers

1 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
2 386, 389 (9th Cir. 2012).

3 **ALJ’S FINDINGS**

4 At step one, the ALJ found Plaintiff did not engage in substantial gainful
5 activity during the period from her alleged onset date of September 1, 2013, through
6 her date last insured of June 30, 2017. Tr. 17. At step two, the ALJ found that
7 through the date last insured, Plaintiff had the following severe impairments:
8 degenerative disc disease of the lumbar spine, chronic obstructive pulmonary
9 disease, and fibromyalgia. Tr. 18. At step three, the ALJ found that through the
10 date last insured, Plaintiff did not have an impairment or combination of
11 impairments that meets or medically equals the severity of one of the listed
12 impairments. Tr. 20.

13 The ALJ then found that, through the date last insured, Plaintiff had the
14 residual functional capacity to perform light work with the following additional
15 limitations:

16 She was limited to occasional climbing of ladders, ropes, and
17 scaffolds, balancing, stooping, kneeling, crouching and crawling.
18 She must avoid concentrated exposure to excessive vibration,
19 hazards, temperature extremes, and pulmonary irritants.

20 Tr. 22.

21 At step four, the ALJ found that through the date last insured, Plaintiff was
capable of performing past relevant work. Tr. 27. Thus, the ALJ concluded that
Plaintiff was not under a disability, as defined in the Social Security Act, at any time

1 from September 1, 2013, the alleged onset date, through June 30, 2017, the date last
2 insured. Tr. 28.

3 ISSUES

4 Plaintiff seeks judicial review of the Commissioner's final decision denying
5 disability income benefits under Title II of the Social Security Act. ECF No. 10.

6 Plaintiff raises the following issues for review:

- 7 1. Whether the ALJ properly considered the medical opinion evidence; and
- 8 2. Whether the ALJ properly considered Plaintiff's subjective allegations.

9 ECF No. 10 at 2.

10 DISCUSSION

11 A. Medical Opinions

12 For claims filed on or after March 27, 2017, the regulations provide that the
13 ALJ will no longer "give any specific evidentiary weight...to any medical
14 opinion(s)..." *Revisions to Rules Regarding the Evaluation of Medical Evidence*,
15 2017 WL 168819, 82 Fed. Reg. 5867-88 (Jan. 18, 2017); 20 C.F.R. § 404.1520c.²

16 ² Plaintiff argues the "specific and legitimate" standard continues to apply despite
17 the new regulations. ECF No. 12 at 2-6. The Ninth Circuit has concluded that the
18 new regulations displace the "irreconcilable" and "incompatible" specific and
19 legitimate reasons standard. *Woods v. Kijakazi*, 32 F.4th 785, 790-92 (9th Cir.
20 2022). Plaintiff discusses *Woods* but appears to overlook the Court's conclusion
21 that, "[o]ur requirement that ALJs provide 'specific and legitimate reasons' for

1 Instead, an ALJ must consider and evaluate the persuasiveness of all medical
2 opinions or prior administrative medical findings from medical sources. 20 C.F.R. §
3 404.1520c(a) and (b). Supportability and consistency are the most important factors
4 in evaluating the persuasiveness of medical opinions and prior administrative
5 findings, and therefore the ALJ is required to explain how both factors were
6 considered. 20 C.F.R. § 404.1520c(b)(2). The ALJ may, but is not required, to
7 explain how other factors were considered. 20 C.F.R. § 404.1520c(b)(2); *see* 20
8 C.F.R. § 404.1520c(c)(1)-(5).

9 *I. Susan Taylor, ARNP*

10 In January 2019, Ms. Taylor submitted a letter describing Plaintiff's current
11 health condition and health history. Tr. 650-51. She noted Plaintiff had been a
12 patient for a long time and has "multiple severe, disabling, chronic, recurring
13 medical conditions," and listed the following diagnoses: degeneration of the
14 lumbosacral discs, spinal stenosis in the cervical region, fibromyalgia, chronic
15 obstructive pulmonary disease, insomnia, stage II chronic kidney disease, vitamin D
16 deficiency, chronic fatigue, severe migraines, vision problems, hearing problems,
17

18 rejecting a treating or examining doctor's opinion, which stems from the special
19 weight given to such opinions . . . is likewise incompatible with the revised
20 regulations." *Id.* at 792.

1 major depression, hot flashes, stress incontinence, carpal tunnel syndrome, arthritis,
2 bowel incontinence, cyclic vomiting, chronic pain, apical lung scarring, family
3 history of Agent Orange exposure, and a history of Barrett's esophagus. Tr. 650.
4 Ms. Taylor opined that Plaintiff is unable to work because her conditions interfere
5 with her ability to remember daily tasks, lift, bend, carry, walk, sit, stand, attend
6 appointments on time, maintain hygiene, communicate with others, and participate
7 in meaningful work. Tr. 650. She also indicated that Plaintiff would be unable to
8 keep appointments. Tr. 650.

9 Plaintiff argues the ALJ improperly failed to consider Ms. Taylor's
10 statement. ECF No. 10 at 16. The ALJ must articulate how persuasive it finds "all
11 of the medical opinions" from every medical source. 20 C.F.R. § 404.1520c(b).
12 Defendant argues Ms. Taylor's statement does not constitute a medical opinion and
13 therefore the ALJ did not need to provide any analysis. ECF No. 11 at 17 (citing
14 20 C.F.R. § 404.1520b(c)). A medical opinion is a statement from a medical
15 source about what a claimant can still do despite his or her impairments and
16 whether the claimant has impairment-related limitations or restrictions in the
17 ability to perform the physical, mental, environmental, or other demands of work
18 activities. 20 C.F.R. § 404.1513. Ms. Taylor's statement that Plaintiff's symptoms
19 interfere with certain aspects of her physical and mental functioning at least
20 arguably constitutes a medical opinion. However, the ALJ did not discuss or
21 reference her statement anywhere in the decision. Plaintiff's counsel referred Ms.

1 Taylor's statement twice during the hearing, so the ALJ was on notice that the
2 statement was at least perceived by Plaintiff to be a medical opinion. Tr. 49, 62.
3 Under these circumstances, the ALJ's failure to comment on Ms. Taylor's
4 statement or reference it in the decision makes unclear whether the ALJ considered
5 the statement. This matter must be remanded so the ALJ can consider Ms.
6 Taylor's statement.

7 *2. Thomas B. Curtis, M.D.*

8 In January 2021, Dr. Curtis completed a "Multiple Impairment Residual
9 Functional Capacity Report" form and listed chronic pain as Plaintiff's primary
10 diagnosis with other diagnoses of lumbar degenerative disk and joint disease,
11 multiple joint arthritis, cervical spondylosis, peripheral neuropathy, depression,
12 emphysema, and stress. Tr. 821-27. He opined that Plaintiff could sit for one hour
13 and stand/walk for one hour in an eight-hour workday, that her sitting tolerance is
14 about 10 minutes at a time, that she could occasionally lift 0-5 pounds, and that she
15 had moderate limitations for use of the upper extremities. Tr. 823-25. He indicated
16 that work would cause her symptoms to increase; that pain fatigue or other
17 symptoms constantly interfere with attention and concentration; that Plaintiff is
18 incapable of even low stress work; that she needs unscheduled 20-minute breaks
19 several times and hour; and that Plaintiff would always miss work. Tr. 825-26.

20 The ALJ found Dr. Curtis' opinion to be unpersuasive. Tr. 26-27. First, the
21 ALJ found the January 2021 opinion to be unpersuasive because it was formed more

1 than four years after the date last insured. Tr. 27. However, the ALJ may not reject
2 an opinion on that basis alone; the question is whether the opinion related back to
3 the relevant period. “We think it is clear that reports containing observations made
4 after the period for disability are relevant to assess the claimant’s disability. It is
5 obvious that medical reports are inevitably rendered retrospectively and should not
6 be disregarded solely on that basis.” *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir.
7 1988) (internal citations omitted); *see Turner v. Comm’r of Soc. Sec. Admin.*, 613
8 F.3d 1217, 1228-29 (9th Cir. 2010) (“[E]vidence post-dating the [date last insured]
9 is probative of ... pre-[date last insured] disability.”); *Lester v. Chater*, 81 F.3d 821,
10 832 (9th Cir. 1995) (“[M]edical evaluations made after the expiration of a
11 claimant’s insured status are relevant to an evaluation of the preexpiration
12 condition.”) (quoting *Smith*, 849 F.2d at 1225); *see also Svaldi v. Berryhill*, 720 F.
13 App’x 342, 343-44 (9th Cir. 2017) (indicating that medical opinion issued after the
14 DLI should be considered because it referred to the chronic condition and symptoms
15 during the relevant period); *Morgan v. Colvin*, No. 6:12-CV-1235-AA, 2013 WL
16 6074119, at *10 (D. Or. Nov. 13, 2013) (affirming rejection of a treating medical
17 opinion when it was completed years after the DLI and was not offered as
18 retrospective analysis); *Capobres v. Astrue*, No. CV 1:09-682-REB, 2011 WL
19 1114256 (D. Idaho Mar. 25, 2011) (rejecting opinion because it was outside relevant
20 time period where the opinion was not offered as retrospective to the relevant time
21

1 period). This was not a legitimate basis for rejecting Dr. Curtis' opinion without
2 evaluating whether it related back to the relevant period.

3 The ALJ also found the physical and mental imitations assessed by Dr. Curtis
4 "contrast[] sharply" with Plaintiff's essentially normal presentation at appointments,
5 statements about improved symptoms and functioning with medication, and her
6 daily activities and work activity as a security guard. Tr. 27. However, the ALJ did
7 not explain how supportability and consistency were considered as required by the
8 regulations. 20 C.F.R. § 404.1520c(b)(2). The ALJ's explanation for finding Dr.
9 Curtis' opinion unpersuasive is therefore legally insufficient. On remand, the ALJ
10 should reevaluate Dr. Curtis' opinion and explain how supportability and
11 consistency factor into the persuasiveness of the opinion.

12 **B. Symptom Testimony**

13 An ALJ engages in a two-step analysis to determine whether a claimant's
14 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must
15 determine whether there is objective medical evidence of an underlying impairment
16 which could reasonably be expected to produce the pain or other symptoms alleged."
17 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not
18 required to show that her impairment could reasonably be expected to cause the
19 severity of the symptom she has alleged; she need only show that it could reasonably
20 have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591
21 (9th Cir. 2009) (internal quotation marks omitted).

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
5 citations and quotations omitted). “General findings are insufficient; rather, the ALJ
6 must identify what testimony is not credible and what evidence undermines the
7 claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *see also Thomas v.*
8 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility
9 determination with findings sufficiently specific to permit the court to conclude that
10 the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and
11 convincing [evidence] standard is the most demanding required in Social Security
12 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
13 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

14 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*
15 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
16 claimant’s testimony or between his or her testimony and his or her conduct; (3) the
17 claimant’s daily living activities; (4) the claimant’s work record; and (5) testimony
18 from physicians or third parties concerning the nature, severity, and effect of the
19 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

20 The ALJ gave five reasons for giving less weight to Plaintiff’s symptom
21 allegations: (1) her allegations are out of proportion to the objective findings; (2)

1 Plaintiff continued smoking cigarettes and marijuana despite the recommendation of
2 her treating providers that she stop; (3) the longitudinal record does not corroborate
3 Plaintiff's symptom claims; (4) Plaintiff stopped working for reasons other than her
4 impairments; and (5) Plaintiff's use of a wheelchair is inconsistent with the record.
5 Tr. 23-26.

6 First, in evaluating the objective evidence, Plaintiff asserts the ALJ incorrectly
7 reported the results of her March 2020 MRI of the lumbar spine. ECF No. 10 at 7.
8 The ALJ stated the March 2020 MRI showed "mild to moderate degenerative disc
9 disease of the lumbar spine but only mild stenosis and mild abutment of sacroiliac
10 (SI) nerve roots." Tr. 23 (citing Tr. 829-30, 1063-64). The MRI findings actually
11 state: "[m]ild to moderate lower lumbar spine degenerative changes, including mild
12 central canal stenosis at L5-S1 with disc abutment of bilateral descending S1 nerve
13 roots." Tr. 829. Plaintiff is correct that "mild" is not specifically used to describe
14 the disc abutment of the nerve roots, although it would certainly be reasonable to
15 read "mild" as modifying the entire finding of "canal stenosis at L5-S1 with disc
16 abutment of bilateral descending S1 nerve roots." However, since this matter is
17 remanded on other grounds, the ALJ should reevaluate this finding to ensure that the
18 evidence is not overstated or misstated.

19 Plaintiff also argues the ALJ improperly considered the lack of pneumothorax
20 in evaluating a chest CT. ECF No. 10 at 8. The ALJ noted that March 2014 chest
21 images showed significant bronchial wall thickening and pleural effusion but no

1 pneumothorax. Tr. 23 (citing Tr. 445). The CT report includes findings of
2 “[b]ronchial wall thickening is noted throughout both lungs,” and “[t]here is no
3 significant pleural effusion. No pneumothorax is seen.” Tr. 445. Plaintiff argues
4 that a lack of pneumothorax is an insignificant finding since she did not allege a
5 collapsed lung. ECF No. 10 at 8. Although in the context of all of the findings cited
6 by the ALJ regarding Plaintiff’s lung condition, Tr. 23 (citing 436-38, 449, 515, 522-
7 23, 635, 667-68), this is a nominal finding and not inaccurate, Plaintiff’s point is
8 well-taken. On remand, the ALJ should ensure that irrelevant findings are not used
9 to bolster an otherwise well-supported conclusion. Additionally, the ALJ
10 inaccurately reported pleural effusion was found when “no significant pleural
11 effusion” was noted. Tr. 23, 445. The ALJ should reevaluate the objective evidence
12 to make sure it is accurately considered.

13 Plaintiff also argues the ALJ failed to properly consider her fibromyalgia
14 symptoms. ECF No. 10 at 10. Defendant argues that the ALJ discussed Plaintiff’s
15 pain, ECF No. 11 at 9, but the ALJ did not consider the unique nature of
16 fibromyalgia and did not discuss SSR 12-2p. *See* Social Security Ruling 12-2p,
17 2012 WL 3104869 (effective July 25, 2012). Fibromyalgia is a disease that eludes
18 objective measurement. *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004).
19 “[A] person with fibromyalgia may have ‘muscle strength, sensory functions, and
20 reflexes [that] are normal.’” *Revels v. Berryhill*, 874 F.3d 648, 663 (9th Cir. 2017).
21 Normal objective examination results can be “perfectly consistent with debilitating

1 fibromyalgia.” *Id.* at 666. While Defendant is correct that the ALJ’s discussion of
2 muscle strength, sensory functions, and reflexes could be relevant to Plaintiff’s other
3 conditions, ECF No. 11 at 9, on remand, the ALJ should explain how fibromyalgia
4 was evaluated in light of its unique characteristics.

5 Plaintiff also argues the ALJ’s “bald assertion” that Plaintiff’s allegations
6 were out of proportion to the objective findings was not specific enough. ECF No.
7 10 at 6 (citing *Lambert v. Saul*, 980 F.3d 1266, 1278 (9th Cir. 2020)). This Court
8 concludes the ALJ’s discussion of the evidence is specific enough to allow the
9 reader to determine what evidence was considered in evaluating Plaintiff’s
10 symptom claims. As the *Lambert* court noted, “Our cases do not require ALJs to
11 perform a line-by-line exegesis of the claimant’s testimony, nor do they require
12 ALJs to draft dissertations when denying benefits.” *Id.* at 1277. However, since
13 the ALJ must reassess the objective evidence as discussed above, the ALJ should
14 ensure that the findings regarding objective evidence as it relates to Plaintiff’s
15 testimony are analytical and not just “non-specific conclusions” or a “relatively
16 detailed overview” of the evidence. *Id.* at 1277-78; see *Lewin v. Schweiker*, 654
17 F.2d 631, 635 (9th Cir. 1981) (“(A)n examiner’s findings should be as
18 comprehensive and analytical as feasible . . . so that a reviewing court may know
19 the basis for the decision.” (quoting *Baerga v. Richardson*, 500 F.2d 309 (3d Cir.
20 1974))).
21

1 Second, the ALJ found that Plaintiff's continued smoking despite
2 recommendations that she quit suggests that her COPD was not as limiting as
3 alleged and reflects an unwillingness to comply with treatment. Tr. 24. It is
4 unsettled in the Ninth Circuit whether a failure to stop smoking is a reasonable basis
5 for giving less weight to a claimant's symptom claims. *See Bray v. Comm'r of Soc.*
6 *Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (declining to find error in
7 assessing claimant's continued smoking in the credibility determination because four
8 other independent bases supported the credibility determination, but noting that "[i]t
9 [was] certainly possible that [claimant] was so addicted to cigarettes that she
10 continued smoking even in the face of debilitating shortness of breath and acute
11 chemical sensitivity") (citing *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190,
12 1197 (9th Cir. 2004)); *Shramek v. Apfel*, 226 F.3d 809, 812–13 (7th Cir. 2000)
13 (noting, in dicta, that nicotine's addictive properties made it "extremely tenuous" to
14 discredit a claimant's description of her impairments based on the claimant's
15 continued smoking). As Defendant observes, district court cases in the Ninth Circuit
16 are mixed. *See e.g., Heather E. v. Comm'r of Soc. Sec. Admin.*, 1:20-CV-3235-
17 TOR, 2021 WL 9758807 (E.D. Wash., December 13, 2021) (finding failure to stop
18 smoking despite pulmonary symptoms was not an example of noncompliance with
19 treatment undermining Plaintiff's credibility); *McKenzie v. Kijakazi*, No. 1:20-cv-
20 0327-JLT, 2021 WL 4279015, *9-10 (E.D. Cal. Sept. 21, 2021) (finding failure to
21 quit smoking offered "limited support" to the ALJ's rejection of Plaintiff's

1 statements); *Jones v. Colvin*, 1:14-cv-01991-JLT, 2016 WL 816484, *8 (E.D. Cal.
2 March 2, 2016) (finding that failure to quit smoking supported the ALJ's adverse
3 credibility determination because Plaintiff had not explained his failure to comply
4 with treatment plan to quit). Thus, while it may not be error for the ALJ to consider
5 Plaintiff's failure to stop smoking in evaluating her symptom claims, neither is it a
6 particularly compelling reason.

7 Third, the ALJ found the longitudinal record does not corroborate Plaintiff's
8 symptom claims. Tr. 24-25. Contradiction with the medical record is a sufficient
9 basis for rejecting the claimant's subjective testimony. *Carmickle v. Comm'r of*
10 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Johnson v. Shalala*, 60 F.3d
11 1428, 1434 (9th Cir. 1995). The ALJ evaluates a claimant's statements for their
12 consistency, both internally and with other information in the case record. Social
13 Security Ruling 16-3p, 2017 WL 5180304, at *5 (effective October 25, 2017). In
14 light of the other errors, including overlooking Ms. Taylor's statement, the ALJ
15 should also reassess the longitudinal record to ensure that findings are supported
16 by substantial evidence.

17 Fourth, the ALJ found Plaintiff stopped working for reasons other than her
18 impairments. Tr. 25. An ALJ may consider that a claimant stopped working for
19 reasons unrelated to the allegedly disabling condition in evaluating symptom claims.
20 See *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008); *Bruton v.*
21 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). The ALJ noted that Plaintiff worked

1 as a security guard eight hours a day, one day per week from January 2015 through
2 December 2016. Tr. 185, 189, 198. Plaintiff reported that she stopped working on
3 December 31, 2016, due to her conditions. Tr. 197. However, the ALJ noted that in
4 December 2016, Plaintiff told her doctor that medication reduced her pain and
5 helped her work security, but that “work has been . . . slow.” Tr. 566-67. The ALJ
6 inferred that Plaintiff stopped working due to a reduction in work rather than
7 because of disabling impairments. Tr. 26.

8 Plaintiff argues the ALJ “confused the timeline” because she alleged disability
9 beginning September 2013 and her part-time security guard work began in January
10 2015. ECF No. 10 at 13. Plaintiff and the ALJ both overlooked that Plaintiff
11 amended the alleged onset date September 8, 2016, at the hearing. Tr. 40. On
12 remand, the ALJ should address the amended alleged onset date and if it is not
13 applicable, explain that finding. Plaintiff also argues the reason she stopped working
14 as a security guard is not relevant because of minimal earnings and high doses of
15 opioids. ECF No. 10 at 14. Nevertheless, the regulations provide that employment,
16 even work that is not substantial gainful activity, during a period of claimed
17 disability may be probative of a claimant’s ability to work. 20 C.F.R. § 404.1571;
18 *see Bray*, 554 F.3d at 1227. The ALJ did not err by considering Plaintiff’s work as a
19 security guard or in making an inference supported by the record to the extent
20 Plaintiff worked during a period of alleged disability.

1 Fifth, ALJ found Plaintiff's use of a wheelchair is inconsistent with the
2 record. Tr. 25. Non-prescribed use of a wheelchair or cane may be considered in
3 evaluating a claimant's subjective expression of limitations. *See Chaudhry v.*
4 *Astrue*, 688 F.3d 661, 671 (9th Cir. 2012). The ALJ noted that Plaintiff testified at
5 the hearing in 2021 that she needs a wheelchair, Tr. 57, and in 2019 she reported
6 that she used a walker and a cane, Tr. 215, but there is no evidence in the record
7 before the date last insured that she was prescribed a wheelchair or other assistive
8 device or that she medically required one. Tr. 26. The ALJ noted that in
9 September 2014, Plaintiff stated she walked for exercise (Tr. 582); in January 2015
10 she was observed ambulating without difficulty (Tr. 396); in July 2015, Plaintiff
11 denied issues with walking, balance, or feeling unsteady, (Tr. 341); and in January
12 and April 2017, Plaintiff demonstrated normal gait, station, and posture (Tr. 493,
13 498). To the extent that Plaintiff alleged she needed an assistive device before the
14 date last insured, substantial evidence appears to support the ALJ's conclusion.
15 However, it is unclear that when Plaintiff reported using assistive devices, she
16 intended to reference the period before her date last insured of June 30, 2017. The
17 ALJ cited no records suggesting Plaintiff was using an assistive device without a
18 prescription or against medical advice during the relevant period. As discussed by
19 the ALJ, this reasoning is not supported by substantial evidence and does not
20 undermine Plaintiff's symptom claims for the relevant period.
21

CONCLUSION

Having reviewed the record and the ALJ's findings, this Court concludes the ALJ's decision is not supported by substantial evidence and free of harmful legal error. Plaintiff requests that the matter be remanded for further proceedings, ECF No. 10 at 20, and the Court finds that remand is appropriate. On remand, the ALJ should consider the opinion of Ms. Taylor and Dr. Curtis and provide legally sufficient reasons in evaluating the persuasiveness of the opinions. The ALJ should also reevaluate Plaintiff's symptom claims in accordance with this order.

Accordingly,

1. Plaintiff's Motion for Summary Judgment, **ECF No. 10**, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

3. This case is **REVERSED** and **REMANDED** for further administrative proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. § 405(g).

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED September 21, 2023.



LONLY R. SUKO

Senior United States District Judge